WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
JANUARY, 2011

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Brown
Dane
Milwaukee
Sheboygan
St. Croix
Waukesha
Winnebago
Wood

TUESDAY, JANUARY 4, 2011

9:45 a.m.	09AP472	State v. David J. Balliette
10:45 a.m.	09AP806-CR	State v. Marvin L. Beauchamp
1:30 p.m.	08AP3182	Steve Ottman v. Town of Primrose

WEDNESDAY, JANUARY 5, 2011

9:45 a.m.	08AP1139	State v. Omer Ninham
10:45 a.m.	09AP538	Steven T. Kilian v. Mercedes-Benz USA, LLC
1:30 p.m.	07AP35	David Rasmussen v. General Motors Corporation, et al.

THURSDAY, JANUARY 6, 2011

10:00 a.m.	09AP564	DeBoer Transportation, Inc. v. Charles Swenson
11:00 a.m.	09AP1669	Roger H. Fischer, Sr. v. Pamela A. Steffen, et al.
1:30 p.m.	08AP2929	Wendy M. Day v. Allstate Indemnity Company

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 4, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Winnebago County Circuit Court decision, Judge Karen L. Seifert, presiding.

2009AP472 State v. David J. Balliette

In this case, the Supreme Court is asked to examine the analysis governing claims of ineffective assistance of post-convictions counsel, based on counsel's alleged failure to argue an issue.

Some background: In 2000, following a four day trial, a jury convicted David J. Balliette of homicide by the intoxicated use of a motor vehicle and homicide by use of a motor vehicle with a prohibited blood-alcohol concentration. He also pleaded no contest to and was convicted of operating after revocation.

The charges arose from the 1999 death of Michele Thein, who was killed instantly when Balliette's pick-up truck struck her car as she was making a left turn into her driveway. Balliette had been traveling behind Thein and was attempting to pass her on the left when the accident occurred. Balliette's blood alcohol tested 0.183 percent two hours after the crash.

At trial, the state presented 17 witnesses, including an accident reconstruction expert who determined that Balliette's failure to slow down and wait to determine what Thein was going to do was a factor in causing the collision. The state's expert testified that Balliette's version of the accident was impossible because, contrary to Balliette's claim that Thein had braked hard without warning and turned, her vehicle did not leave skid marks.

Balliette, the only defense witness, claimed that despite his intoxication, he had exercised due care. He stated that Thein failed to use her turn signal and braked suddenly while pulling to the right, leading him to believe she was allowing him to pass. He said he slammed on his brakes, which locked the wheels causing him to skid, and the right front corner of his truck struck Thein's car near the rear driver's side wheel, forcing both vehicles into the ditch. He argued the accident would have occurred even if he were sober. Balliette's trial counsel did not call an accident reconstruction expert at trial.

Nine years after conviction, Balliette filed a *pro se* Wis. Stat. § 974.06 motion claiming, among other things, that post-conviction counsel was ineffective for omitting a challenge to trial counsel's failure to retain an accident reconstruction expert. The post-conviction court determined the motion was insufficient and denied it without a hearing.

Representing himself, Balliette appealed. The Court of Appeals disagreed, concluding the motion provided sufficient objective material fact assertions that, if true, would warrant relief. The Court of Appeals held that the trial court erroneously exercised its discretion and concluded a remand would be necessary to clarify trial counsel's reasoning.

Balliette contends the Court of Appeals determined that the issues ignored by counsel were stronger than those raised, and therefore viable on appeal on claims of ineffective assistance of counsel.

The state contends a "bare conclusory allegation of ineffective post-conviction counsel does not satisfy the material fact specificity requirement for a post-conviction evidentiary hearing; nor does it provide 'sufficient reason' to excuse a defendant's failure to raise additional claims on direct review." The state contends that if the Court of Appeals' decision is left to stand, it would significantly affect future cases involving claims of post-conviction counsel.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 4, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Jeffrey A. Wagner, presiding.

2009AP806-CR State v. Beauchamp

In this case, the Supreme Court examines whether "dying declarations" made under the circumstances presented here constitute a permissible exception to the confrontation clause of the Sixth Amendment to the U.S. Constitution. The confrontation clause generally guarantees a criminal defendant's right to confront an accusing witness in court.

Some background: Marvin L. Beauchamp was convicted of shooting Bryon Somerville to death outside a Milwaukee apartment. Somerville made comments at the crime scene, on the way to the hospital and at the hospital that implicated Beauchamp. Sommerville died shortly after his arrival at the hospital.

There is really no dispute that the victim's statements were dying declarations. The question is whether those statements were properly admitted at trial. Other eyewitness testimony was inconsistent, so the dying statements were material evidence.

The trial court held that Somerville's assertions that Beauchamp shot him were admissible under Wis. Stat. Rule 908.045(3) as Somerville's dying declarations, and were not barred by Beauchamp's right to confront witnesses testifying against him.

Beauchamp appealed, and the Court of Appeals affirmed. Beauchamp claimed that the trial court erroneously admitted as dying declarations the victim's assertions that Beauchamp shot him, and that his due-process rights were violated because the trial court received as substantive evidence prior inconsistent statements by two of the state's witnesses.

Whether an assertion in a dying declaration is within an exception to the rule against hearsay is a matter within the trial court's discretion. Typically, out-of-court assertions may not be used for their truth at a trial by virtue of the rule against hearsay. Wis. Stat. §§ 908.01 & 908.02. The "dying declaration" is an exception to this rule and is explicitly codified at Wis. Stat. § 908.045(3).

The Court of Appeals first observed that the traditional rationale for receipt of the dying declaration as an exception to the hearsay rule was the assumption that no person will "leave life with a lie on the lips." See Idaho v. Wright, 497 U.S. 805, 820 (1990). Beauchamp argues that whatever validity that assumption might have had in the era when the dying-declaration rule was first adopted, it has lost much of its vitality today.

Beauchamp contends that the "rationale ignores other motivations that might be just as powerful, such as bias or the desire for revenge, and the organic changes attendant to traumatic injuries that can affect the brain and the victim's abilities to accurately perceive, recall, and recount what has occurred."

Beauchamp also presents an ineffective assistance of counsel claim because his attorney failed to challenge inconsistent statements made by two witnesses who said they saw Beauchamp in a dispute with Somerville before the shooting. They both acknowledged that they had signed statements but later claimed they were pressured to do so by police. The witnesses' testimony at trial tended to favor Beauchamp.

A decision by the Supreme Court could clarify whether the confrontation clause bars the admission of testimonial dying declarations against a defendant, and whether a defendant's right to due process of law restricts the substantive use of prior inconsistent statements.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 4, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Dane County Circuit Court decision, Judge Jeffrey A. Wagner, presiding.

2008AP3182 Ottman v. Town of Primrose

In this case, the owners of a farm in the Town of Primrose ask the Supreme Court to review the denial by the town board of permits required to build a home and driveway on agricultural property.

Some background: In 2004, Steve and Sue Ottman filed a preliminary permit application with the Town of Primrose planning commission and board. The Ottmans asked for approval to build a residence and driveway on their farm, which they were developing into a Christmas tree farm. The proposed site for the residence was the highest point on the property, about 75 feet north of their agricultural accessory building and adjacent to a field road running from the town road, through the center of the farm, to the top of the hill. The Ottmans asked for permission to convert the current field road into a driveway to access the proposed residence.

Following extensive proceedings, the town denied the Ottmans' request. The town concluded the Ottmans failed to meet the requirements of the town's land-use plan or the town's ordinances because they failed to meet the minimum requirements for income from land production and minimal impact on their agricultural land.

The Ottmans filed a petition for certiorari review. The circuit court affirmed. The Ottmans appealed, and the Court of Appeals affirmed.

The Court of Appeals noted that in an appeal from a circuit court order entered upon a petition for certiorari review, review is limited to whether the board kept within its jurisdiction; whether it proceeded on a correct theory of law; whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and whether the evidence was such that it might reasonably make the order or determination in question. Klinger v. Oneida County, 149 Wis. 2d 838, 845, 440 N.W.2d 348 (1989).

The Court of Appeals said it presumes a board's decision is correct and valid, and that the town's building ordinance provides that the town clerk shall issue or re-issue building or driveway permits once the town board determines certain conditions are met.

The Ottmans asked the Court of Appeals to reexamine the law according deference to decisions made by local governments on certiorari review.

The Court of Appeals said this request was misplaced since the Court of Appeals may not overrule, modify or withdraw language from a published opinion of the Court of Appeals or the Supreme Court. Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

The Ottmans contend the town erred in denying their application for building and driveway permits. They urge the Supreme Court to revise the historic rule of judicial deference to land-use decisions. They argue that it is inappropriate to give great deference to land-use decisions made by smaller units of government. They argue as smaller units of government assume a larger role in land use decision-making, the challenge is not only to provide an impartial tribunal but also to provide one having the skill and sensitivity needed to adjudicate the competing legal rights and interests of the community and the applicant.

Specifically, the Ottmans ask the Supreme Court to review several issues:

> - Does the current judicial rule on deference to land use decisions by smaller units of government overly insulate the balancing of community interests and individual property rights from judicial review?

- Is the town engaged in regulation of the use of land such that statutory certiorari applies and the judicial rule limiting the scope of statutory certiorari should be overruled?

- Does the decision by the town fail to withstand conscientious judicial scrutiny of the basis for deference and the customary standard of judicial review?

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 5, 2011
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Brown County Circuit Court decision, Judge John D. McKay, presiding.

2008AP1139 State v. Ninham

This case, which was held in abeyance pending the outcome of a U.S. Supreme Court case, examines whether the life sentence handed down to a boy convicted of first-degree intentional homicide that was committed when he was 14 years old constitutes cruel and unusual punishment.

Some background: On March 24, 2000, a jury found Omer Ninham guilty of first-degree intentional homicide in the death of 13-year-old Zong Vang. Ninham was 16 years old when he was convicted and sentenced to life without the possibility of parole on June 29, 2000. Ninham and four accomplices knocked Vang off his bicycle without provocation, beat him, chased him to the fifth story of a parking ramp and threw or pushed him over the side to his death.

Before rendering sentence, the sentencing court considered several read-in offenses. Ninham threatened a judge and intimidated three witnesses after his arrest. One of these threats was to rape a woman and "make sure it's a slow death." While awaiting trial, Ninham's conduct reports include sharpening a weapon and attempting to escape. The presentence investigation report noted that Ninham experienced chronic instability, violence and alcoholism in his home.

The trial court focused on the brutality of the killing and other evidence of Ninham's character to sustain the sentence. Both the trial court and the Court of Appeals rejected arguments made on behalf of Ninham in initial post-conviction motions, and the Supreme Court denied review at that time. The length of sentence was not really an issue on appeal. State v. Ninham, 2001AP716–CR (Wis. Ct. App., Dec. 4, 2001). Rather, the appeal alleged ineffective assistance of trial counsel.

In upholding the sentence, the Court of Appeals ruled that "[a] sentence to life without the possibility of parole for a crime committed by a 14-year-old does not *per se* violate the constitutional prohibition against cruel and unusual punishment."

In March 2005, the U.S. Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), established a new constitutional inquiry for sentencing children. In Roper, the U.S. Supreme Court upheld the Missouri Supreme Court's conclusion that the Eighth Amendment prohibits execution of juveniles. Simmons' sentence was reduced to life without parole for a crime he committed as a 17-year-old.

On Oct. 18, 2007, Ninham filed a post-conviction motion for sentencing relief under Wis. Stat. § 974.06. The motion was denied by the trial court in a decision affirmed by the Court of Appeals. A petition for review followed and was held in abeyance pending the outcome of another U.S. Supreme Court case, Sullivan v. Florida, No. 08-7621, 560 U.S. ___ (2010).

Now represented by the Equal Justice Initiative, Ninham argues that the United States Supreme Court's decision in Roper established a new constitutional inquiry for sentencing children. Ninham asserts that he is the only person in the State of Wisconsin "who has been sentenced to die in prison" for an offense committed at the age of 14.

The state, asserts that the death penalty cases cited by Ninham "do not in any way render his sentence unconstitutional."

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 5, 2011
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge Ralph M. Ramirez, presiding.

2009AP538 Kilian v. Mercedes-Benz

This case examines provisions of Wisconsin's "Lemon Law" as it relates to a lease agreement.

Some background: Plaintiff Steven Kilian had sought damages for alleged violations of the law after Daimler Chrysler Financial Services Americas (Financial) notified him that he was delinquent on lease payments for a vehicle that he had returned.

In March of 2006, Kilian had entered a 39-month lease agreement with Financial for a 2007 Mercedes-Benz S550V LWB. He experienced numerous problems with the vehicle, which led him to seek a refund under Wisconsin's Lemon Law. On May 20, 2007, Kilian returned the vehicle to the dealer and received a refund check from Mercedes-Benz. He then began receiving phone calls from Financial indicating that he was in default on his lease payments. He also received a payment notice in the mail and a "federal legal notice" dated July 1, 2007, indicating that Financial would report negative information about his lease account to credit bureaus. Kilian responded by explaining that the vehicle had been returned and the lease should be considered terminated.

When his efforts to resolve the matter failed, the plaintiff filed suit on July 10, 2007. On Aug. 29, 2007, Mercedes-Benz paid off the lease by making a $95,252.37 payment to Financial. Kilian argued Mercedes-Benz violated the statute by not automatically refunding to Financial the current value of the lease within 30 days of the plaintiff's demand for a refund. Mercedes-Benz argued that its obligation to pay off the lease is only triggered when the lessor, Financial, offers to transfer title of the vehicle to Mercedes-Benz.

The circuit court granted summary judgment in favor of Mercedes-Benz and Financial. Kilian appealed, and Mercedes-Benz and Financial cross-appealed. The Court of Appeals affirmed, noting that summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court of Appeals noted that under § 218.0171(2)(cm)1, a consumer lessee receives a refund by offering to return the lemon to the manufacturer and when the refund is provided the consumer returns the vehicle to the manufacturer. The Court of Appeals noted that although § 218.0171(2)(b)3.a requires the manufacturer to refund to the lessor the current value of the written lease, the statute does not address how the refund is made.

Kilian says if the lower courts' holdings are allowed to stand, consumers will be faced with collection efforts and potential reporting to credit agencies by lessors who know that they can ignore the Lemon Law. The plaintiff argues that defamation damages should be recoverable under the Lemon Law where the defamatory actions were taken as a step to specifically enforce a lease in violation of the Lemon Law.

Kilian says if he does not recover attorney fees from Financial, he will bear the burden of enforcing his Lemon Law rights. He says even after he hired an attorney to convince Financial that its lease was unenforceable, Financial continued to seek enforcement of the lease, including threatening to defame the plaintiff by reporting his unpaid lease debt to the credit reporting agencies.

Mercedes Benz contends requiring the manufacturer to provide a refund to the ownerlessor at the same time the consumer-lessee obtains a refund of lease payments, and requiring the owner-lessor to relinquish title to the vehicle regardless of whether it desires to do so, nullifies part of the law that unambiguously requires the owner-lessor to offer title to the manufacturer as a condition to obtaining any refund.

Mercedes-Benz and Financial also assert that the plaintiff's dismissed claim for attorney fees does not require review since the law is well established that the plaintiff was not entitled to recover attorney fees since he was not the prevailing party.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 5, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge John A. Franke, presiding.

2007AP35 Rasmussen v. General Motors Corp.

This case examines Wisconsin's "long-arm statute," Wis. Stat. § 801.05(1)(d), and whether the Court of Appeals erred in holding in this case that Nissan Japan is not subject to personal jurisdiction under the circumstances presented here.

Some background: In 2003, David Rasmussen and Lisa A. Lindsay (Rasmussen) filed a class action antitrust suit against various automobile companies, including Nissan Japan and its wholly owned subsidiary Nissan North America. The suit alleged that the auto companies conspired to maintain new car prices in the United States at significantly higher levels than prices in Canada for the same vehicles.

The suit alleged that as part of the conspiracy the defendants arranged for U.S. car dealers to not honor warranties on cars imported from Canada, to prevent the lower priced Canadian Nissans from being exported to this country. The plaintiffs alleged that the circuit court had personal jurisdiction over all defendants because they all had "directly or through their subsidiaries, affiliates or agents" conducted business in Wisconsin, based on Nissan dealerships throughout the state.

Nissan Japan moved to dismiss for lack of personal jurisdiction. It argued it had no contacts with Wisconsin and therefore was not subject to personal jurisdiction here. Following a hearing, the circuit court denied Nissan's motion to dismiss without prejudice, pending jurisdictional discovery.

A jurisdictional hearing was held in August 2006. The circuit court found that Wisconsin did not have personal jurisdiction over Nissan Japan and that exercising jurisdiction over Nissan Japan would violate due process. The circuit court rejected the plaintiffs' claim that Nissan North America was merely the alter-ego of Nissan Japan operating in Wisconsin such that Nissan Japan could be subject to general jurisdiction under § 801.05(1)(d).

Rasmussen appealed, and the Court of Appeals affirmed.

The Court of Appeals agreed with Nissan Japan that the circuit court's unchallenged factual findings precluded Wisconsin's exercise of specific jurisdiction under § 801.05(4). It noted the threshold inquiry under the statute is whether there was an out-of-state act by the defendant that caused injury to person or property within the state.

Rasmussen asks the Supreme Court to determine to what extent Wisconsin citizens can obtain recourse for wrongs committed by corporations that do business in the state through authorized agents. Rasmussen argues that Nissan Japan is subject to personal jurisdiction in Wisconsin under § 801.05, and that exercising jurisdiction over Nissan Japan did not violate due process.

Rasmussen says in determining whether there is general personal jurisdiction over a person, the court will attribute to a defendant any person's acts for which the defendant is legally responsible. They argue that a corporation is a legal fiction that can act only through its agents. The agents may be other corporations, including subsidiaries. Rasmussen reasoned since corporations cannot act other than through agents, § 801.05(1)(d) necessarily provides that general personal jurisdiction may be exercised over a non-resident corporation where its agents engage in substantial and not isolated activities on its behalf in Wisconsin.

Nissan Japan says the circuit court did not find that Nissan North America's activities were undertaken on behalf of Nissan Japan. Instead, the circuit court specifically found the absence of any such evidence.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 6, 2011
10:00 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Wood County Circuit Court decision, Judge Edward F. Zappen, Jr., presiding.

2009AP564 DeBoer Transp. v. Swenson

In this case, the Supreme Court examines when an administrative agency's interpretation of a statute and its application of facts have a "rational basis," and when it does not. The rational-basis test provides that a court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective and does not implicate the Due Process or Equal Protection clauses of the Constitution.

Some background: Charles Swensen had been working for Wausau Carriers trucking company, but when DeBoer Transportation Inc. took over that company in August 2005, Swenson became a DeBoer employee. Swenson injured his knee at work on Aug. 23, 2005. In February 2006, Swenson was released to return to work without any restrictions other than wearing a knee brace.

Swenson contacted DeBoer and began a reorientation program that DeBoer uses for drivers who have been off work for more than 60 days. Swenson cooperated with various requirements, including a physical examination, drug screening, a review of company policies, and a short road test required by the Department of Transportation.

The final thing Swenson needed to do before being placed back on the job was to go on a check-ride to have his driving skills evaluated by another driver. The check-ride required a returning driver to be away from home for a few days or more.

Prior to his injury, Swenson drove a daily route for DeBoer that allowed him to be home during part of each day to provide care for his terminally ill father. If Swenson participated in the overnight check-ride, he would have needed to locate and personally pay for a care provider for his father for part of each day that he was gone. Swenson asked DeBoer if he could complete his check-ride locally so it would not interfere with his daily routine of caring for his father. In the alternative, Swenson told DeBoer that he would complete the check-ride if DeBoer would pay the additional cost of caring for his father during the time he was away. DeBoer refused to consider making alternate check-ride arrangements. Swenson refused to cooperate with the overnight truck ride and was not rehired.

Swenson brought an unreasonable refusal to rehire claim against DeBoer before the state Labor and Industry Review Commission (LIRC). An administrative law judge (ALJ) found that DeBoer unreasonably refused to rehire Swenson. The ALJ said that Swenson had no reason to believe DeBoer intended to give him anything but the same daily route once he was recovered from his work injury. The ALJ noted this was not a case where Swenson had restrictions and DeBoer could not provide work to accommodate the restrictions.

The circuit court affirmed. DeBoer appealed, and the Court of Appeals, with Judge Charles P. Dykman dissenting, reversed and remanded.

The Court of Appeals said although it might be true that DeBoer could have met its safety concerns by requiring a less demanding check-ride specially tailored for Swenson, that did not mean that requiring Swenson to cooperate with the normal check-ride process was unreasonable. The Court of Appeals concluded that reasonable cause was shown by DeBoer's uniform application of its longstanding safety testing procedure to Swenson and there was not evidence to support an inference that DeBoer refused to rehire Swenson because of his injury.

Swenson asks the Supreme Court to clarify when an administrative agency's interpretation of a statute and its application of facts have a rational basis and when it does not. Swenson says Dykman

properly concluded that the portion of the ALJ decision pertaining to DeBoer's failure to accommodate Swenson's personal needs was unnecessary to the analysis.

Specifically, Swensen asks the Supreme Court to review if the LIRC had a reasonable basis under the facts for finding that DeBoer did not have reasonable cause to refuse to rehire Swensen.

DeBoer says the level of deference to be given administrative agency decisions is well established and does not require further clarification.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 6, 2011
11:00 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Sheboygan County Circuit Court decision, Judge L. Edward Stengel, presiding.

2009AP1669 Fischer v. Steffen

In this insurance case resulting from an automobile accident, the Supreme Court examines the interaction of law involving arbitration and subrogation claims for medical expenses.

Some background, according to the Court of Appeals: Roger H. Fischer and Pamela A. Steffen were in an automobile accident. Fischer was injured and incurred $12,157.14 in medical expenses.

Fisher's American Family Insurance policy contained medical expense coverage up to $10,000, which American Family paid to Fischer, thereby creating a subrogation interest in favor of American Family. American Family then agreed with Steffen's insurer, Wilson Mutual, that they would arbitrate American Family's $10,000 subrogation claim against Steffen and Wilson Mutual. The arbitration panel ruled against American Family, accepting Steffen's defense that she was excused from liability because she had suffered a sudden and incapacitating illness (an epileptic seizure) that had caused her to be unable to operate her vehicle properly. Fischer was not part of the agreement to arbitrate and did not participate in the arbitration.

When Fischer subsequently sued Steffen and Wilson Mutual, he also named American Family for the purpose of having American Family's subrogation interest determined. American Family answered, acknowledging it had issued a policy to Fischer and that it had paid $10,000 under its medical expense coverage. American Family also cross-claimed against Steffen and Wilson Mutual for the $10,000 it had paid to Fischer.

Wilson Mutual then informed American Family's counsel that American Family had earlier agreed to submit its subrogation claim against Steffen and Wilson Mutual to binding arbitration and had lost. American Family subsequently dismissed itself from the lawsuit with prejudice as far as its subrogated interests were concerned.

Fischer took the case to trial, and the jury, unlike the arbitration panel, rejected Steffen's defense. Apparently relying on testimony that Steffen had a history of epileptic seizures in the past, the jury rejected her defense that she had an "unforeseen" seizure and found instead that her negligence had caused the collision. Pursuant to a stipulation, the court found that the medical expenses portion of the verdict was $12,157.14.

Fischer moved for judgment on the verdict. The circuit court agreed with Steffen and Wilson Mutual that the verdict should be reduced by the $10,000 that Fischer had received from American Family under the rule set forth in Paulson v. Allstate Ins. Co., 2003 WI 99, 263 Wis. 2d 520, 665 N.W.2d 744. Thus, it changed the medical expense portion of the verdict from $12,157.14 to $2,157.14.

Fischer appealed the portion of the judgment that reduced his claim for medical expenses by $10,000. The Court of Appeals rejected Fischer's argument that American Family had waived its subrogation interest for medical expenses by agreeing to arbitration and then voluntarily dismissing its subrogation claim in the circuit court action. It characterized the subrogation interest of the insurer as "trumping" the collateral source rule, which provides that a legally responsible tortfeasor may not reduce his/her liability because the victim obtained reimbursement for his/her damages from a collateral source, such as an insurer.

The Court of Appeals concluded, in part, "…that once the plaintiff has been paid in full by the subrogated insurer, that insurer stands in the shoes of the plaintiff." The insurer is then free to determine how it wishes to go about seeking reimbursement from the other party to the accident and that party's insurer.

Fischer asks the Supreme Court to rule that an insurer cannot settle or arbitrate a subrogation claim for medical expenses until there has been a determination that the plaintiff insured has been made whole. He contends that the Court of Appeals' decision "seems to obfuscate" established settlement procedure in tort cases involving subrogation claims.

The Supreme Court's decision is expected to address the effect of a subrogated insurer's agreement to arbitrate its subrogation claims against the opposing party and that party's insurer prior to a lawsuit being filed by the insured and without the insured's consent.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 6, 2011
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a St. Croix County Circuit Court decision, Judge Edward F. Vlack, presiding.

2008AP2929 Day v. Allstate Indemnity

This insurance case, arising from the death of a child who drowned in a bathtub during an epileptic seizure, examines the interpretation of the family-member policy exclusion.

Some background, according to the Court of Appeals: On Nov. 27, 2006, Emma Day suffered two seizures at school and was sent home. Her parents, Wendy and Clinton Day, were divorced, and Emma was staying with her father and her step-mother, Holly Day, that night. Holly prepared a bath for Emma in the evening. The complaint alleges that while temporarily unattended in the bath, Emma suffered a severe seizure and drowned. At the time of Emma's death, Clinton and Holly carried a homeowners' insurance policy with Allstate. Like most homeowners' policies, theirs insured against liability for injury to third persons.

A family exclusion clause limited this broad grant of coverage by excluding losses for "bodily injury to an insured person … whenever any benefit of this coverage would accrue directly or indirectly to an insured person."

The Court of Appeals said there is no dispute that Clinton, Holly and Emma are all "insured persons" under the policy, and that Wendy is not an insured person. Wendy brought wrongful death and survivorship claims against Holly, alleging Holly's negligent supervision caused Emma's death. Holly tendered her defense to Allstate.

By stipulation, Holly was dismissed from the action and Wendy was left to pursue her claims against Allstate. On cross-motions for summary judgment, the circuit court construed the policy to require coverage. It rejected Allstate's reliance on the family exclusion clause, reasoning no insured person would benefit from coverage.

The Court of Appeals reversed. It said Clinton, an insured person, would benefit from coverage by virtue of his entitlement to half of any recovery on Wendy's claims as Emma's father. It remanded with directions to grant summary judgment in favor of Allstate.

Wendy Day contends that in the context of a wrongful death claim, where the father has opted not to pursue the claim, the Allstate family exclusion provision is ambiguous and should have been construed by the Court of Appeals to afford coverage. She also contends that the Allstate family-exclusion policy is contrary to public policy.

Allstate contends the only issue is whether the plain language of the exclusion applies.